No. 93-912

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES E. PRENTICE AND JANE G. PRENTICE, *et al.*,
Petitioners,
v.
TITLE INSURANCE COMPANY OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION

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PARTIES IN THIS PROCEEDING

Pursuant to Rules 29.1 and 24, this brief in opposition to the petition is filed by six of the title insurance companies and four of the individuals who were named as defendants in the Wisconsin state court suit that is the subject of the petition. The filing respondents are the defendants identified as the "MDL-633 defendants" in the judgment of the trial court. Pet. App. 76. The filing respondent title insurance companies are: Chicago Title Insurance Company, Ticor Title Insurance Company, Security Union Title Insurance Company, Lawyers Title Insurance Corporation, Stewart Title Guaranty Company and First American Title Insurance Company of the Midwest. The filing respondent individuals are: Charles B. Schiereck, Philip M. Larkin, Richard Stopcznski and Donald Grabski.

Respondents *Chicago Title Insurance Company, Ticor Title Insurance Company*, and *Security Union Title Insurance Company* are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of these petitioners has publicly traded common stock.

Respondent *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Lawyers Title Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of Lawyers Title Insurance Corporation has publicly traded common stock.

Respondent *First American Title Insurance Company of the Midwest* is a wholly-owned subsidiary of First American Title Insurance Company, which is a wholly-owned subsidiary of First American Financial Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of First American Financial Corporation has publicly traded common stock.

Respondent *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation, the common stock of which is traded on the New York Stock Exchange. Non-wholly-owned subsidiaries of Stewart Title Guaranty Company are listed in the Appendix to this brief.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Page

Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 114 S.Ct. 56 (1993) ..2, 3, 6, 7
California v. ARC America Corp., 490 U.S. 93 (1989) 5-6
Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326 (1913) 7
FTC v. Ticor Title Ins. Co., 112 S.Ct. 2169 (1992), *reversing* 922 F.2d 1122 (3d Cir. 1991); *on remand*, 998 F.2d 1129 (3d Cir. 1993), *petition for certiorari pending* (No. 93-856, filed Nov. 29, 1993) 1-2
Hanson v. Denckla, 357 U.S. 235 (1958) 7
In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988) 2
Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922) 5
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 7
Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 7
Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986) 5
State v. Waste Management of Wisconsin, Inc., 81 Wis.2d 555, 261 N.W.2d 147 (1977), *cert. denied*, 493 U.S. 865 (1978) 5

Statute

28 U.S.C. § 1257 ..... 4, *passim*

Other Authority

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, SUPREME COURT PRACTICE § 4.10 (7th ed. 1993) 6

IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION

The petition should be denied because it seeks review of a judgment of the Wisconsin Supreme Court on a matter of Wisconsin state antitrust and insurance law. The judgment does not present a federal issue within this Court's jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The case below was one of several private class action suits which followed from a Federal Trade Commission investigation of the activities of state-licensed title insurance rating bureaus, which filed title insurance rates and charges for review by regulatory authorities in several states.[1] In contrast to other suits seeking injunctive relief

[1] The FTC investigation has led to further proceedings in the federal courts. *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992),

and damages under the federal antitrust laws,[2] the case below was filed in 1989 in the Circuit Court of Milwaukee County, Wisconsin, on behalf of a purported class of purchasers of title insurance and related services for Wisconsin real estate transactions, seeking damages exclusively under Wisconsin state law. Petition Appendix ("Pet. App.") 52, 54, 66, 68-69. The complaint alleged that the defendant title insurance companies and individual employees had violated Wisconsin antitrust and insurance laws by participating in the Wisconsin title insurance rating bureau, and that the plaintiff class members were entitled to damages. No claims were asserted under federal law and no federal jurisdiction was alleged. Pet. App. 66, 68.

After briefing and argument, the Circuit Court of Milwaukee County dismissed the plaintiffs' claims. Pet. App. 71-79. It held that the damage claims were barred by the filed tariff doctrine, because the plaintiffs in effect sought to obtain lower rates for the regulated insurance and services than were provided by the rates or tariffs on file with the state Commissioner of Insurance. Pet. App. 74-75. The court also held, as to the group of defendants filing the present brief, that the claims were barred by res judicata because of a prior federal class action settlement. Pet. App. 72-73. The trial court did not reach other grounds for dismissal that had been raised by the defendants. Pet. App. 78.

In the judgment that the petitioners would have this Court review, the Wisconsin Supreme Court affirmed the dismissal on grounds of the filed tariff doctrine, without

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reversing 922 F.2d 1122 (3d Cir. 1991); *on remand*, 998 F.2d 1129 (3d Cir. 1993), *petition for certiorari pending* (No. 93-856, filed Nov. 29, 1993).

[2] *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 114 S.Ct. 56 (1993).

reaching any other issue. Pet. App. 5. The filed tariff doctrine, in the words of the Wisconsin Supreme Court, "prohibits a plaintiff from claiming a lower rate than the one filed by a regulated entity with the appropriate regulatory agency, because the filed rate alone governs the relationship between the parties." *Id.* In applying the doctrine to bar a damage claim asserted under Wisconsin state antitrust and insurance law, the Wisconsin Supreme Court noted that the filed tariff doctrine had been stated in holdings of this Court for nearly a century, including cases in which the doctrine had been invoked to bar federal antitrust damage claims, *id.* at 5-6, and had been applied in holdings of Wisconsin courts since at least 1911 with respect to both federal- and Wisconsin-regulated industries, *id.* at 7. The Wisconsin Supreme Court stated that its decision to apply the filed tariff doctrine to bar the plaintiffs' state antitrust claims was based on "[the Wisconsin Supreme Court's] policy of conforming our antitrust decisions to those of the United States Supreme Court, coupled with [the Wisconsin Supreme Court's] history of consistently applying the filed rate doctrine." Pet. App. 8.

After the Wisconsin Supreme Court rendered its decision affirming the dismissal of the plaintiffs' claims, the plaintiffs filed a motion for reconsideration in which they argued for the first time that the resolution of the filed tariff issue was governed, under the doctrine of offensive collateral estoppel, by the holding of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted on other grounds*, 114 S.Ct. 56 (1993). In *Brown*, the Ninth Circuit held that federal Sherman Act claims against some of the same defendants arising from the operation of the Wisconsin rating bureau were not barred by the filed tariff doctrine. 982 F.2d at 393-394. The Wisconsin Supreme Court issued an order which denied the motion for reconsideration without comment, Pet. App. 47, and the plaintiffs filed their petition for review in this Court.

REASONS FOR DENYING THE WRIT

This Court has jurisdiction to review the decision of a state supreme court by a writ of certiorari where (1) there is a question of the validity of a treaty or statute of the United States; (2) the validity of a state statute is in question on grounds of conflict with the United States Constitution, treaties or laws; or (3) a title, right, privilege or immunity is claimed under the Constitution, treaties, laws or authority of the United States.[3] Because the Wisconsin Supreme Court's judgment does not present a federal issue within this Court's jurisdiction under 28 U.S.C. § 1257, the petition should be denied.

1. The petition seeks review of a judgment of the Wisconsin Supreme Court on a wholly state law matter—that is, whether Wisconsin's regulation of title insurance rates and charges precludes a remedy in damages for an alleged Wisconsin state law antitrust violation. The judgment does not involve any "title, right, privilege or immunity" under the Constitution, treaties, laws or authority of the United States. Nor does it call into question the validity of any federal statute, or the validity of any state statute on federal constitutional or statutory grounds. Both the statutory basis for the plaintiffs' claims and the regulatory structure giving rise to the dispositive defense arose entirely under Wisconsin state law.

That the Wisconsin Supreme Court disposed of the

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[3] Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

plaintiffs' claims by applying the filed tariff doctrine does not present a federal issue establishing jurisdiction in this Court. The petition wrongly characterizes this doctrine as a "federal . . . antitrust damage rule." Pet. at 3. In fact, as the decision below itself makes clear, the filed tariff doctrine is a general legal doctrine of broad application, more than a hundred years old, which has been applied by Wisconsin courts in the context of a broad range of contract and tort claims. *See* Pet. App. 5-8. Indeed, in reaching its decision the Wisconsin Supreme Court specifically adverted to its own "history of consistently applying the filed rate doctrine" in Wisconsin state law contexts. *Id.* at 8. The application, in a wholly state-law context, of this general legal principle concerning the availability of damages in rate-regulated industries does not implicate any federal "title, right, privilege or immunity."

2. No federal issue is raised by the fact that the Wisconsin Supreme Court conformed its application of the filed tariff doctrine to this Court's decisions applying the doctrine to bar federal law antitrust damage claims. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 408 (1986). Contrary to the plaintiffs' assertion, Pet. at 2, the Wisconsin Supreme Court did not follow these decisions because it was compelled to do so under the Supremacy Clause of the United States Constitution. Rather, it did so because of a Wisconsin state policy to construe its own state antitrust laws in a fashion consistent with federal decisions under the Sherman Act. Pet. App. 8 (*citing State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 569, 261 N.W. 2d 147 (1977), *cert. denied*, 493 U.S. 865 (1978)). As this Court has recognized, it is not a federal law matter but rather a State's prerogative whether to conform its state antitrust laws to federal antitrust decisions. *See California v. ARC America Corp.*, 490 U.S. 93, 102-103

(1989) (federal antitrust laws do not pre-empt state antitrust law; states may make their own determination of the remedies available for state antitrust violations). The Wisconsin Supreme Court's discussion of federal antitrust precedent does not change the fact that the case was brought under Wisconsin law and was resolved by the Wisconsin Supreme Court pursuant to Wisconsin state law and policy.

For the same reason, the differing precedent represented by the decision of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-394 (9th Cir. 1992), *cert. granted on other grounds*, 114 S.Ct. 56 (1993), does not create a federal issue establishing jurisdiction in this Court. The incorrect result reached by the Ninth Circuit, which refused to apply the filed tariff doctrine to federal Sherman Act claims arising from the same context, does not make a federal issue of the Wisconsin Supreme Court's decision applying the doctrine to state law claims.[4]

3. The petitioners expressly disclaim as an independent ground for seeking review the issue of the purported collateral estoppel effect of the *Brown* decision. Pet. at 26 n.22. This issue would in any event be outside this Court's jurisdiction to review, because it was not properly "drawn in question" or "set up or claimed" below as required by 28 U.S.C. 1257. Although the *Brown* decision was discussed as precedent at oral argument before the Wisconsin Supreme Court, the plaintiffs did not raise a collateral estoppel argument until their

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[4] *See generally* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, SUPREME COURT PRACTICE § 4.10 at 181-184 (7th ed. 1993). While a conflict between a federal appellate decision and the decision of a state supreme court in applying a general legal principal may support review of the federal appellate judgment, the "[state court] decision, of course, resting as it does upon adequate nonfederal grounds, is not reviewable by the Supreme Court." *Id.* at 181.

motion for reconsideration (Pet. 26, Pet. App. 18-23), and the issue was not ruled upon by the Wisconsin Supreme Court in denying reconsideration (Pet. App. 47). Unless it is clear that the issue was affirmatively considered and resolved, there is no jurisdiction in this Court to review an issue raised for the first time in a motion for reconsideration of the decision below. *Hanson v. Denckla,* 357 U.S. 235, 243-244 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-334 (1913).[5]

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[5] The Wisconsin Supreme Court would have been justified in refusing to apply nonmutual offensive collateral estoppel to the *Brown* decision, consistent with the "broad discretion" granted courts to apply that doctrine in light of its purposes and the interests of justice. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979). The special role of the Wisconsin Supreme Court as ultimate interpreter of Wisconsin law, the fact that the collateral estoppel issue was not raised until after the parties and the Wisconsin state courts had already fully addressed the filed tariff defense, the inconsistency that would have resulted as between the *Brown* defendants and the others if collateral estoppel were applied, and the *Brown* decision's misapplication of controlling precedent, were among the considerations strongly weighing against application of collateral estoppel by the Wisconsin Supreme Court. *See* Pet. App. 36-39.

CONCLUSION

The petition should be denied because it does not present an issue within this Court's jurisdiction to review under 28 U.S.C. § 1257.

Respectfully submitted,

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APPENDIX

SUBSIDIARIES (except wholly owned subsidiaries) OF STEWART TITLE GUARANTY COMPANY

American Surveying of New England
Associated Abstract Agency, Inc.
Baca Landata, Inc.
Backman-Stewart Title Services, Ltd.
Blaine County Title Associates
Cambridge Landata Incorporated
Citizens Title & Trust
Fleetwood Management Corporation
Island Title Corporation
Island Title Exchange, Inc.
Landata, Inc. of Illinois
Landata, Inc. of the Midwest
Nacogdoches Abstract & Title Company
O'Rourke Title Company
Peoples Title Agency, Inc.
Potomac Title & Escrow
Priority Title Company—Houston Division
Priority Title Company—North Texas Division
Shaw-Landata, Inc.
Stewart Approved Title, Inc.
Stewart Escrow & Title Services of Lawton
Stewart-Fidelity Title Company
Stewart Holding Company
Stewart-Princeton Abstract Company
Stewart River City Title, Inc.
Stewart Tax Service
Stewart Title (Glendale)
Stewart Title Agency of Bergen County
Stewart Title Agency of Ohio, Inc.
Stewart Title & Associates (Chesapeake)
Stewart Title & Escrow, Inc.
Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
Stewart Title Company of Colorado Springs

Stewart Title Company of Contra Costa
Stewart Title Company of Minnesota
Stewart Title Delaware, Inc.
Stewart Title of Aspen, Inc.
Stewart Title of Boulder County
Stewart Title of Central Nevada
Stewart Title of Clearwater, Inc.
Stewart Title of Eagle County
Stewart Title of Fort Meyers, Inc.
Stewart Title of Fresno County
Stewart Title of Glenwood Springs, Inc.
Stewart Title of Larimer County
Stewart Title of Lubbock, Inc.
Stewart Title of Mobile, Inc.
Stewart Title of Modesto
Stewart Title of Monterey County
Stewart Title of Montgomery County, Inc.
Stewart Title of Nevada
Stewart Title of New Orleans
Stewart Title of North Carolina, Inc.
Stewart Title of Northern California
Stewart Title of Northern Nevada
Stewart Title of Oregon, Inc.
Stewart Title of Pennsylvania, Inc.
Stewart Title of Pensacola, Inc.
Stewart Title of Rhode Island, Inc.
Stewart Title of Rockport, Inc.
Stewart Title of San Patricio County, Inc.
Stewart Title of Santa Barbara (A division of Stewart Title of Fresno County)
Stewart Title of Sarasota
Stewart Title of Tampa
Stewart Title of the Inland Empire
Stewart Title Orange County
STT Investment Corporation
Texarkana Title & Abstract Co., Inc.
Unique Exchange, Inc.